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OPEN MARKETS, COMPETITIVE DEMOCRACY, AND TRANSPARENT AND RELIABLE LEGAL SYSTEMS: THE THREE LEGS OF DEVELOPMENT

JAMES R. JONES*

When I was in Congress in the 1970s and '80s, one of the areas in which I specialized was international trade. Our trade subcommittee visited nations in all parts of the world to try to open new avenues of commerce for the United States. Those were the days of the cold war. Many of the nations we visited were severely restricted in opportunities for their people either because of the yolk of communism or other dictatorships, economic isolation, or government corruption. I often theorized about what would be the best way for these nations to enjoy the freedoms and opportunity that we took for granted in the United States.

Was it better to open the political system first as Mr. Gorbachev did with Glasnost in the Soviet Union, or was it better to open the economic system first as was done in Chile? My theory and conclusion was the first opening should be economic, and that would create a new set of owners who had a stake in the system. They would then demand the opening of the political system.

In 1993, I found myself able to test my theories in practice when President Clinton asked me to go to Mexico as the U.S. Ambassador. Primarily, the President wanted me to help him pass and then implement the North American Free Trade Agreement (NAFTA). Of my six objectives when I arrived in Mexico, the first was to deepen and broaden the commercial relationship between our countries, and the second was to assist in promoting real democracy in Mexico. NAFTA was the engine that opened

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the economic system. It's difficult for many to understand that in just the last twenty years Mexico advanced from one of the most closed economies in the world, in which it was not even a member of the World Trade Organization, then known as GATT, to one of the most open and competitive economic systems in the world today. That stands as a major achievement.

But what I saw was that opening the economic system helped create a demand among Mexicans to open the political system. Before NAFTA, Mexico called itself a democracy, but it was a closed political system in which one political organization kept itself in power for more than seventy years through either legal or, if necessary, corrupt means. For example, in 1988, when a new opposition party appeared to be winning the presidency on election night, suddenly it was announced to the media that the computers counting the votes had malfunctioned and shut down. When the computers were restored, the government, the dominant party, turned the tide and won the election. Furthermore, the paper ballots were inexplicably destroyed in a warehouse fire several days later. But after NAFTA opened up Mexico, the next presidential election found international election observers for the first time and a very expensive, state-of-the-art, and virtually tamperproof voting system that conducted an honest and fair election. While the dominant party won again, it did so by the narrowest of margins and the election result was accepted by the opposition parties. Six years later in 2000, the opposition presidential candidate, Vicente Fox, won and defeated the dominant party for the first time since the 1920s when the party formed. Today Mexico is one of the most competitive, open democracies in the world.

Several factors converged in Mexico to make this economic and political transformation occur. Foremost was a new generation of leaders who for the first time received much of their university and graduate education outside of Mexico. They were called "technocrats" because they were trained in economics, business, and law at some of the finest universities in the United States and Europe. And what propelled virtually all of them was to make Mexico a fully recognized and respected first world country.

We saw similar stories unfold throughout most of Latin America in the '90s. By the mid-'90s, all thirty-four hemisphere nations except Cuba had democratically-elected governments and, in general, free market economies.

But Latin America has not been fully recognized as a first world nation. To achieve that status requires three reforms in my opinion. Open markets and democracies are clearly two. But a transparent, reliable rule of

law and administration of justice is the third important requirement, and in many respects it is the hardest to achieve.

Latin America is not known for the transparency of its legal systems nor the competence of its judicial institutions. Some of this stems from the region's history where the Napoleonic or civil code is dominant. Under the civil code, neither transparency nor precedence of decisions reigns. It has developed into a top-down, paperwork-burdened, glacially-slow, and generally-perceived corrupt way to resolve disputes.

In some countries, the judicial system has been corrupted to the extent that it inhibits the foreign investment which is so vital to economic growth. To a U.S. investor, the civil code is untrustworthy and sometimes downright scary. For example, unlike English common law in which a defendant is presumed innocent until proven guilty, under the civil code that presumption is reversed; that is, a defendant is presumed guilty until he proves his innocence. When I was ambassador and to this day in Mexico, I had to deal with injustices against U.S. companies who had a contract dispute with a Mexican entity. Under the civil code in Mexico, a contract dispute can be transformed from the civil docket, which is notoriously slow in rendering decisions, to the criminal docket. When that happens, a party to the contractual dispute can get an arrest warrant and have the other party's executive put in jail. They can stay there until they convince the court of their innocence. I have personally involved myself in a few of these cases and in each case there was strong suspicion that corruption with the local prosecutor or judge caused this to take place. Needless to say, foreign executives are leery about investing in such places.

Currently, I am a member of a Council of the Americas working group studying the judicial and legal systems of the hemisphere. We have found that various trade agreements—starting with NAFTA—have been instrumental in improving the rule of law in the hemisphere. NAFTA encourages alternative dispute resolution mechanisms to settle commercial disputes. The Central American and Dominican Republic Free Trade Agreement (CAFTA) and other pending bilateral trade pacts with Colombia, Peru, and Panama either strongly encourage or require that alternative dispute resolution methods be established as a fundamental factor in facilitating trade and commerce.

In 1994, when President Zedillo first took office in Mexico, his first act with the Congress was to reform the Supreme Court. The new law made that Court independent and gave it the resources necessary to develop competence and inspire confidence; that confidence in the Supreme Court exists to this day. Unfortunately, the peso devaluation crisis then hit and the

Zedillo government never got back to the reform of the rest of the judicial and law enforcement institutions.

Our Council of the Americas working group concluded that an independent and transparent judiciary facilitates economic growth by reducing perceived risks and creating a more welcoming environment for rising entrepreneurs. We also determined that a necessary pre-condition to the rule of law was to establish a fair and efficient administration of justice. In other words, the substance of a country's laws matter little if the institutions set up to interpret and enforce those laws are inefficient, arbitrary, or corrupt. One foreign investor in Mexico told me that Mexican law, as with most of Latin America, covers everything and yet covers nothing and he had no confidence in the judicial system. Mexico has taken a lead in trying to improve the administration of justice. For example, its Federal Council of the Judiciary, which oversees most Mexican courts, has investigated over 2,000 complaints against judicial personnel and has issued nearly 300 sanctions against these officials. We found that this has helped significantly in weeding out incompetence and corruption.

This consistent vote of no confidence in the rule of law also applies to the regulatory regime throughout the region. Why does Latin America have such a large informal economy? The regulatory structure fosters it. A Harvard study a few years ago found that in Argentina it took seventy-one business days at a cost of twenty-five percent of annual per capita income to traverse the regulatory structure and receive the necessary licenses to start a small business. That same study noted that in Mexico it took 112 business days at a cost of fifty-seven percent of annual per capita income to be able to start a business in the formal economy.

Confidence in a rule of law and administration of justice is fundamental, not just to improving the climate for foreign investment, but also for ordinary citizens of those countries to be able to redress injustices in their everyday lives. We found that in the United States it was our judicial system that led the way to correcting civil rights abuses and discrimination in race or gender. Our rule of law and administration of justice permitted those in the shadows of our society or those with the least amount of political leverage to have their grievances addressed.

One of those major problems in Latin America is the vast gulf between rich and poor. The region has the greatest disparity of wealth of any region in the world. Despite the great advances in economic and political reforms, anywhere from thirty to sixty percent of the population, depending on the nation, receives virtually no tangible benefits from open markets or honest democracies. This is a foundation for instability. It is a large con-

stituency waiting to be led by politicians who are likely to chuck these political and economic reforms and move the country in the opposite direction. When I was ambassador, I regularly visited these areas of great poverty and what I found was not dissimilar to the folklore I heard from my native state of Oklahoma after the Great Depression and dust bowl days of the 1930s. This generation of adults in Latin America knows that their lives are not likely to improve significantly, but they desperately want their children and grandchildren to have opportunities for a much better life. To achieve that requires a massive political and resource commitment to education, to the delivery of health care, and to building infrastructure in the underserved areas.

So far that political commitment has not been forthcoming. A rule of law and accessible judicial system could lead the way to addressing and correcting these grievances.

If political stability and economic strength in Latin America are important to the United States, as these should be, then we must fundamentally change our foreign policy approach to the region. First, we must pay attention to our hemisphere neighborhood. We must begin to erase our image of arrogance, insensitivity, and preaching to these governments and people. We must institute a policy of true partnership and shared responsibility, especially to help the ignored populations share in the tangible benefits of open markets and honest democracies. To accomplish this, we must jointly elevate the education systems, deliver better health care, and build infrastructure in these underserved areas so that workers can be productive and efficiently get their products to global markets. Underpinning these dreams must be a reformed and reliable rule of law. That is our collective challenge.

